IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 325 OF 2004

IN

SUIT NO.4237 OF 2001

Mahavir Gas Service .. Plaintiff

versus

M/s Bengal Mill Stores Supply Co & anr.Defts

...

Mr.Birendra Saraf i/b Udwadia & Udeshi for Plaintiff.

CORAM : D.G. KARNIK, J

DATED : 5th April 2005.

P.C:-

1. Heard learned counsel for the plaintiff. None present for the defendants when called. The plaintiff has filed on record affidavit of service of Sumons for Judgment sworn by Mr.Iqbal Hudda on 3rd March, 2005. Despite service of the Summons for Judgment after amendment of the plaint, the defendants have not filed any affidavit in reply. Even earlier, no affidavit in reply was filed. In the circumstances, the averments

made in the plaint are deemed to be accepted. I have perused the plaint. The defendant no.1 is a partnership firm and the defendant no.2 is its partner. The plaintiff advanced a loan of Rs.2,00,000/- by cheque and the defendant no.1 issued a cheque for Rs.2,00,000/- towards the repayment. The said cheque was dishonoured when presented for payment. Hence, the plaintiff claims the amount of the said cheque of Rs.2,00,000/-. I see no reason not to grant the said claim of Rs.2,00,000/-.

2. The plaintiff has further averred that on the oral request of the defendant no.2 in the capacity as partner of the defendant no.1, the defendants issued a pay order of Rs.2,00,000/- in favour of a third party on the defendants promising to repay the said sum. The alleged promise of the defendants to repay is oral. Therefore, the suit so far as claim of Rs.2,00,000/- is based on a oral promise and not on a written contract under the Negotiable Instrument Act. The suit therefore cannot be tried as a summary suit.

3. Regarding the third claim of Rs.1,50,000/- the plaintiff has not pleaded in the plaint any written contract for payment nor has he averred the mode in

which Rs.1,50,000/- was paid. Hence, the claim of Rs.1,50,000/- also cannot be tried as a summary suit.

4. In the circumstances, the plaintiff would only be entitled to a decree for Rs.2,00,000/- in respect of the suit which is based on the Negotiable Instruments Act namely the cheque issued by the defendant no.1. Rest of the claim in the suit would have to be tried as a regular suit. Hence, I pass the following order

> " The suit of the plaintiff is decreed to the extent of Rs. 2,00,000/-. For rest of the claim of the plaintiff the suit is transferred to the list of commercial causes. Suit be tried as a regular suit. "

D.G.KARNIK, J